MICHIGAN
LAW REVIEW

VOL. VI MAY, 1908 NO. 7

LIMITED PARTNERSHIP IN AMERICA AND ENGLAND.

AT last Great Britain has legalized Limited Partnership. More than a quarter of a century ago, Sir Frederick Pollock called attention to the fact that the United Kingdom was almost the only civilized country of the world which had not adopted this institution. The remark was made in an address devoted to an explanation of a bill, which he had drafted, to cover the entire subject of partnership.[1]

Long before this, the economical advantages of limited partnership had been set forth by John Stuart Mill[2] and other writers; and repeated attempts had been made to secure a statute legalizing this form of business association. Each of these attempts had failed. Sir Frederick Pollock was of the opinion that their failure was due to two causes: First, the principle of the desired innovation was not perfectly understood by its champions, and hence their efforts were timid and half-hearted. Second, the proposed bills had been brought before Parliament and the public as a piece of statutory patch work, to be fastened as best it could to the existing uncodified law. He believed that success was far more probable if a more ambitious project was presented. Accordingly he essayed the complete codification of the law of partnership, providing for the new form of business association by a number of sections constituting Part IV of the bill.[3]

[1] Pollock's Essays in Jurisprudence, p. 95, "A paper read before the Bankers' Institute, October 20, 1880, on The Law of Partnership in England."

[2] Political Economy, Book V, Chap. IX, § 7.

[3] In Essays in Jurisprudence, at p. 112, Sir Frederick writes, "If you try to piece on an innovation like *commandite* to existing uncodified law, you have, as it were, no definite place to start from; and what is more, your Bill will at best be intelligible only to those who are familiar with the old law. But if you make the Bill in the nature of a code, you expound your old law before propounding your new matter, and so the Bill is complete and intelligible in itself. In this Bill the ordinary law of partnership is first laid down with as little alteration as possible, and then limited partnership is provided for by defining what a limited partner is, and in what respects his position differs from that of an ordinary partner."

Curiously enough, that part of this bill, which purported to be a codification of existing law, was enacted as a statute, after the vicissitudes of eleven years and many changes;[4] while the portions, relating to limited partnership and to the registration of firms, were dropped. And yet, it was these rejected parts, for which the gentlemen who had employed Sir Frederick to draft the bill, cared most.[5] Writing in 1890 on this topic, he declared that subsequent experience had shown that there was no real demand for either of these rejected innovations.[6] The same view was expressed, in a leading law journal of England, last October.[7] Notwithstanding these expressions of opinion, a limited partnership statute was pushed through the last Parliament and became law on January 1, 1908.[8] How it happened that the interests back of this measure were able to secure from the present government the support necessary to its enactment, I do not know; but it is clear that the cabinet must have decided to favor the bill or it would never have become a statute.[9]

The hesitation of British legislators upon this topic is all the more surprising, because limited partnerships have worked successfully in this country for nearly a century,—so successfully, indeed, that nearly every political jurisdiction in the United States and Canada has legislated for their formation.[10]

It is the purpose of this article to compare such legislation very briefly with the recent Act of Parliament.

The first point of difference to attract attention is that of form. Not only is the British statute more concise than most of our legislative acts on the same topic, but there is less ambiguity of expression and fewer incongruities in the various sections. Probably this is due to the English practice of having bills drawn by official draftsmen before they are accepted by the government for introduction into Parliament.[11]

Passing to matters of substance, it is to be noted that the statute leaves no doubt as to the nature of a limited partnership. It is not

[4] The Partnership Act, 1890, 53 and 54 Vict. Ch. 39.

[5] Preface to Pollock's Digest of the Law of Partnership, p. v.

[6] Ibid.

[7] *Solicitors' Journal*, Vol. 51, p. 790.

[8] An Act to Establish Limited Partnerships, 1907, 7 Edw. 7, Ch. 24.

[9] In a recent address, Mr. Bryce remarked: "The executive is with us primarily responsible for legislation and, to use a colloquial expression, 'runs the whole show,' the selection of the topics, the preparation of bills, their piloting and their passage through Parliament." Methods and Conditions of Legislation, 8 *Columbia Law Rev.*, p. 162.

[10] The writer has been told by a leading barrister of Toronto that the Limited Partnership Act is acted upon very sparingly there, because of the facility of forming limited companies.

[11] See The Methods and Conditions of Legislation, James Bryce, 8 *Columbia Law Rev.*, 157, 160.

a new species of legal institution, and there is no opportunity for the learned and ingenious arguments which were adressed to the courts in some of our states under our statutes.[12] On the other hand, section seven declares that "subject to the provisions of this Act, the Partnership Act, 1890, and the rules of equity and of common law applicable to partnerships, except so far as they are inconsistent with the express provisions of the last-mentioned Act, shall apply to limited partnerships."

The Act provides for but one form of limited partnership; that in which one or more members, called general partners, are liable for all debts and obligations of the firm, while one or more members, called limited partners, are not liable beyond the sum or sums contributed by them to the capital. It does not authorize the limited partnership association, sanctioned in some of our states, "in which the capital subscribed shall alone be responsible for the debts of the association, except under certain circumstances."[13] This species of partnership is quite similar to the limited company, which has long been authorized by statute in Britain.[14]

In the matter of the number of partners, the two lines of legislation are quite different. Our statutes rarely fix a maximum limit to the total membership, although some of them provide that the number of limited partners shall not exceed a prescribed figure.[15] The British Act declares that "a limited partnership shall not consist, in the case of a partnership carrying on the business of banking, of more than ten persons, and in case of any other partnership, of more than twenty persons."[16] It does not specifically prohibit any class of persons from entering these associations;[17] but, on the other hand, does state that "a body corporate may be a limited partner."[18] Nor does it put beyond the pale of this form of partnership any line of business, while our statutes often proscribe banking and

[12] In Ames *v.* Downing (1850), 1 Brad. (N. Y.) 321, it was argued, though unsuccessfully, that the limited partnership provided for by the New York statute was a new species of business association, and that the death of the special partner did not dissolve the firm.

[13] Limited partnerships of this class were before the courts in the following cases: Staver Manufacturing Company *v.* Blake, 111 Mich. 282, 69 N. W. 508 (1896); Edwards *v.* Warren, etc., Works, Limited, 168 Mass. 564, 47 N. E. 502 (1897); Eliot *v.* Himrod, 108 Pa. 569 (1885); Sturgeon *v.* Apollo Oil Co., 203 Pa. 369, 53 Atl. 189 (1902); Deckert *v.* Chesapeake Western Co., 101 Va. 804, 45 S. E. 799 (1903).

A third style of statute is found in Pennsylvania: P. L. 1901, 625, Pepper & Lewis, Digest, "Partnership."

[14] Lindley on Companies.

[15] Code of Maryland, Art. 73, § 2, limiting the number of special partners to six.

[16] § 4, (2).

[17] The present New York statute appears to limit membership to persons of full age. L. 1897, Ch. 420, § 30.

[18] § 4, (4).

insurance,[19] and otherwise limit the business activities of limited partnerships.[20]

The two lines of legislation are wholly in accord, upon one point. Unless the association is organized and registered in accordance with the statutory requirements, it is to be deemed a general partnership, and every member is subject to unlimited liability for its debts and obligations.[21] Honest blundering, or missteps taken, though in good faith, are not to be accounted for statutory rightness.[22]

Perhaps the British Act emphasizes the element of registration, rather than that of substantial compliance with the requirements of the statute as to the contents of the papers to be registered.[23]

There is no doubt that its provisions, relating to the valid formation of a limited partnership, are simpler and more explicit than those in our statutes. They are contained in the eighth section of the Act,[24] which reads as follows:

"The registration of a limited partnership shall be effected by sending by post or delivering to the registrar at the register office[25] in that part of the United Kingdom in which the principal place of business of the limited partnership is situated, or proposed to be situated, a statement signed by the partners containing the following particulars:

(a) The firm name;
(b) The general nature of the business;
(c) The principal place of business;
(d) The full name of each of the partners;
(e) The term, if any, for which the partnership is entered into, and the date of its commencement;
(f) A statement that the partnership is limited, and the description of every limited partner as such;
(g) The sum contributed by each limited partner, and whether paid in cash or how otherwise."

---

[19] N. Y. L. 1897, Ch. 420, § 30.

[20] Bates, Law of Limited Partnership, 31.

[21] British Act, §§ 5 and 8.

[22] "In the place of an inquiry into any such doubtful and speculative questions, the statute substitutes the plain, unequivocal and explicit provision, that if a false statement is made in the certificate, all persons interested in the copartnership shall be liable as general partners. For the same reason, it is not necessary to show any *mala fides* in making the certificates. Partners are bound to know the truth, and they cannot be permitted to say that they acted in good faith in certifying to that which was in fact false." BIGELOW, C.J., in Pierce *v.* Bryant, 5 Allen (87 Mass.) 91 (1862).

[23] *Cf.* § 5, with §§ 30-34 of the present New York statute.

[24] The fourth section, it is true, regulates the number of persons, and provides that the limited partner's contribution may be in cash, or in "property valued at a stated amount."

[25] Under this Act, such a decision as Henkel *v.* Heyman, 91 Ill. 96 (1878), would be impossible.

It will be observed, that the signers are not required to acknowledge this instrument;[26] nor is any affidavit to be made and filed by the general partners to the effect that the certified contributions by the limited partners "have been actually and in good faith" made;[27] nor is any publication of the certificate in a newspaper or otherwise[28] provided for. Red tape is not a characteristic of this statute.

The British statute is equally clear and explicit in its provisions for the registration of changes in limited partnership, as appears from the following section:[29]

"(1) If during the continuance of a limited partnership any change is made or occurs in—

(a) The firm name.

(b) The general nature of the business.

(c) The principal place of business.

(d) The partners or the name of any partner.

(e) The term or character of the partnership.

(f) The sum contributed by any limited partner.

(g) The liability of any partner, by reason of his becoming a limited instead of a general partner, or a general instead of a limited partner. A statement, signed by the firm, specifying the nature of the change shall, within seven days, be sent by post or delivered to the registrar at the register office in that part of the United Kingdom in which the partnership is registered."

It will be observed that the statute does not contemplate a renewal of the partnership, as distinguished from some change in its constitution, or character, or principal place of business; and thus avoids a question which has proved troublesome to our courts. That question is, whether the certificate, to be filed and published upon the renewal or continuance of a limited partnership,[30] must state that the special partner's contribution is unimpaired at the time of renewal—a question upon which the decisions are at variance.[31] In Massachusetts, it has been settled by an amendment of the statute.[32]

[26] *Cf.* N. Y. L. 1897, Ch. 420, § 30.

[27] Ibid. § 31.

[28] Ibid. § 32, and the provisions of other statutes referred to in Burdick, On Partnership (2nd Ed.), pp. 400, 401.

[29] Limited Partnership Act, 1907, § 9. The second subdivision imposes a fine not exceeding one pound upon each general partner for each day during which default in complying with this section continues.

[30] The present New York statute, § 33, declares: "Every such partnership may be renewed or continued beyond the time fixed for its duration, in the manner required for its original formation; and no such partnership shall be deemed to have been originally formed, or so renewed or continued, until a certificate is made, acknowledged, filed and recorded, an affidavit filed, and certificate or notice published as required by law."

[31] Hogan *v.* Hadzsits, 113 Mich. 568, 71 N. W. 1092 (1897), and Fifth Ave. Nat. Bank *v.* Colgate, 120 N. Y. 381, 24 N. E. 799 (1890), hold that such statement is not required; while Fourth Street Nat. Bank *v.* Whitaker, 170 Pa. 297, 33 Atl. 100 (1895), holds that it is necessary.

[32] L. 1887, Ch. 248, § 3, construed in Durgin *v.* Colburn, 176 Mass. 110, 57 N. E. 213 (1900).

The limited partner is prohibited by the British statute, as by our legislation, from withdrawing directly or indirectly any part of his contribution. Here again Parliament has employed fewer words than our legislatures, and has been more explicit.[33] It has also imposed a different liability for the breach of this provision. The British limited partner, who "does so draw out or receive back any such part shall be liable for the debts and obligations of the firm up to the amount so drawn out or received back." In this country[34] such partner is liable not only to restore such sum, but, if the withdrawal amounts to an alteration in the capital of the firm contributed by him, it operates to transform the association into a general partnership and thus subjects him to unlimited liability for all the firm debts.[35]

And here we come upon one of the most radical differences in the two lines of legislation. The British statute nowhere provides for the transformation of a limited partnership into a general partnership. If the association has been duly organized and launched as a firm with limited liability, it remains a limited partnership as long as its existence continues. If a limted partner withdraws any part of his contribution, he becomes liable, as we have seen, for the debts up to the amount withdrawn.[36] If he "takes part in, the management of the partnership, he shall be liable for all debts and obligations of the firm incurred while he so takes part in the management as though he were a general partner.[37] If he "makes, signs, sends or delivers for the purpose of registration under this Act any false statement known by him to be false," "he commits a misdemeanor, and shall be liable to imprisonment with hard labor for a term not exceeding two years."[38] But in no case does his violation of the statute, after the valid formation of the firm, nor its violation by any general partner, forfeit the statutory exemption from liability *in toto*, and convert him into a true general partner.

Such is the effect of certain violations of our statutes, according to the prevailing view in America.[39] A clause common to most of the statutes is that, if a special partner interfere in the business of

[33] British Act, § 4, (3), may be compared with New York Act, L. 1897, Ch. 420, § 39.

[34] The statutes on this point are set forth in Bates, Limited Partnership, Part II, Ch. 2, and their effect stated in Burdick on Partnership (2nd Ed.), pp. 408-410.

[35] California Civil Code, § 2495. See Bates, Limited Partnership, § 92, and authorities cited.

[36] British Act, § 4, (3).

[37] Ibid. § 6, (1).

[38] Ibid. § 12.

[39] Whittemore *v.* Macdonell, 6 Up. Can. C. P. 547 (1857); Hutchinson *v.* Bowes, 15 Up. Can. Q. B. 156 (1858); Farnsworth *v.* Boardman, 131 Mass. 115 (1881); Strang *v.* Thomas, 114 Wis. 599, 91 N. W. 237 (1902). *Cf.* Safe Deposit & Trust Co. *v.* Cahn, 102 Md. 530, 62 Atl. 819 (1906), and Hotopp *v.* Huber, 160 N. Y. 524, 55 N. E. 206 (1899).

the firm contrary to their provisions, "he shall be deemed and be liable as a general partner."[40] When there has been such interference, or other like violation of the law, a creditor of the firm sues the firm as a general partnership and recovers against its members as such. He does not allege the formation of a limited partnership, the violation of the statute and consequent forfeiture of his unlimited liability by the special or limited partner. In the language of a carefully considered decision,[41] "The unauthorized act or interference operates to convert him from a special into a general partner. It fastens that legal character or *status* upon him and takes the other away. He is 'to be deemed' in law, by reason of such interference, a general and not a special partner of that partnership; not of a new partnership, but of that one, from the beginning. This was the construction given to the provision in *The Madison County Bank* v *Gould*,[42] and it is manifestly the only true and consistent one."

The sixth section of the British statute has as its marginal heading: "Modifications of general law in case of limited partnerships." Subdivision (1) permits a limited partner to inspect firm books, examine into the state and prospects of the business, and "advise with the partners thereon;" but forbids his taking part in the management of the partnership business, and denies to him power to bind the firm. Subdivision (2) provides that the death or bankruptcy of the limited partner shall not dissolve the firm, and that his lunacy shall not be a ground for dissolution by the court, unless the lunatic's share cannot be otherwise ascertained and realized. Subdivision (3) directs the affairs of a dissolved limited partnership to be wound up by the general partners, unless the court otherwise orders. The fourth subdivision provides that applications to the court to wind up these associations shall be "by petition under the Companies Acts, 1862 to 1900," subject to any modifications ordered by the Lord Chancellor with the concurrence of the President of the Board of Trade.[43] The fifth subdivision is as follows:

"(5) Subject to any agreement expressed or implied between the partners—

(a) Any difference arising as to ordinary matters connected with the partnership business may be decided by the majority of the general partners.

[40] N. Y. L. 1897, Ch. 420, § 37.

[41] First Nat. Bank of Canandaigua *v.* Whitney, 4 Lans. (N. Y. Supreme Court), 34, 39 (1871).

[42] 5 Hill (N. Y. Supreme Court), 309 (1843).

[43] Rules of this sort are no longer included in British statutes. Bryce, "Methods and Conditions of Legislation," 8 *Columbia Law Rev.* 157, 158. See § 17 of the British Act, providing for more rules.

(b) A limited partner may, with the consent of the general partners, assign his share in the partnership, and upon such an assignment the assignee shall become a limited partner with all the rights of the assignor;

(c) The other partners shall not be entitled to dissolve the partnership by reason of any limited partner suffering his share to be charged for his separate debt.

(d) A person may be introduced as a partner without the consent of the existing limited partners;

(e) A limited partner shall not be entitled to dissolve the partnership by notice."

This section, when taken in connection with those parts of the Partnership Act, 1890, relating to the dissolution of firms, produces a very different result from that which flows from our legislation. With us, a limited partnership must be organized for a definite term, and hence neither a limited nor a general partner can terminate it by notice. Even when all the partners agree upon a dissolution, our statutes generally require that notice thereof shall be filed in the office where the certificate of organization was recorded, and shall be published in a prescribed manner and for a stated period.[44]

Special provision is made in the British Act for advertising any arrangement under which a general partner becomes a limited partner, or a limited partner changes his relation to that of a general partner.[45] Our legislation has not provided for and does not authorize such changes by a mere additional advertisement.[46]

Sections thirteen to sixteen inclusive provide for the registration, the inspection and official copies of the statements required by law to be filed by limited partnerships.

On the whole, this Act commends itself to the writer as a simple and sensible piece of legislation. If the law of partnership is to be codified in this country, under the auspices of Commissioners on Uniform State Laws, this production of Parliament deserves very careful consideration.

FRANCIS M. BURDICK.

COLUMBIA UNIVERSITY SCHOOL OF LAW.

[44] N. Y. L. 1897, Ch. 420, § 42. For other respects in which dissolution under the British statute differs from dissolution under ours, see Burdick on Partnership (2nd Ed.), pp. 418, 419.

[45] British Act, § 10.

[46] Bates on Limited Partnership, Book II, Ch. 2.